Supreme Court, U. S.
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No. 72-700

In the Supreme Court of the United States

OCTOBER TERM, 1972

HENRY HERNANDEZ, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioners were conscientious objectors who were exempted from induction into the armed forces and performed civilian alternative service pursuant to Section 6(j) of the Selective Service Act, 50 U.S.C. App. 456(j), and the governing regulations of the Selective Service System, 32 C.F.R. Part 1660. Upon completion of their alternative service, petitioners sought educational benefits pursuant to the Veterans Readjustment Benefits Act, 38 U.S.C. 1651-1687. The Veterans Administration denied the various claims for benefits since, under the Act, such benefits can only be paid to veterans who have served on "active duty"

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in the armed forces. 38 U.S.C. 1652(a)(1), 101 (2) and (21).

Petitioners thereupon instituted the present actions to compel payment to them of the educational benefits available to veterans. They contended that the Act violates due process in not providing veterans' benefits to them, while providing such benefits to veterans who have served on active duty in the armed forces; and they further argued that the statute "abridges plaintiffs' freedom of religion as guaranteed by the First Amendment." Petitioners sought, *inter alia*, declaratory and injunctive relief, and requested the convening of a three-judge court.

The district court dismissed the action. 339 F. Supp. 913; Pet. App. C. The court held that judicial review of the Veterans Administration determinations of petitioners' eligibility for benefits was explicitly precluded by the "no review" provision in the Veterans Act, 38 U.S.C. 211(a).[1] Alternatively, the court noted that petitioners' various constitutional challenges to the Veterans Readjustment Benefits Act were "insubstantial and without merit" and thus did not warrant

[1] 38 U.S.C. 211(a), as amended, provides:

"(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

the convening of a three-judge court.[2] The court of appeals affirmed (Pet. App. A).

2. Petitioners contend that the bar to judicial review of Veterans Administration decisions in 38 U.S.C. 211(a) cannot be applied to their cases because they are raising constitutional questions. In *Lynch* v. *United States*, 292 U.S. 571, 582, another case involving veterans' benefits, this Court expressly reaffirmed the principle that Congress can preclude judicial review "whatever the character of the proceeding or the source of the right to be enforced" and that the government's immunity from suit in this area "applies alike to causes of action arising under acts of Congress * * * and to those arising from some violation

[2] The district court rejected petitioners' due process challenge to the Act since the "classification scheme is neither arbitrary or unreasonable" (Pet. App. C, 23). The court observed that soldiers on active duty in the armed forces are subject to greater potential for hazardous duty and far greater limitations on personal freedoms (Pet. App. C, 22-23). In addition, the court viewed the limitation of the educational benefit program to veterans of active duty as a reasonable method by which Congress could encourage enlistments (Pet. App. C, 23).

The court also rejected petitioners' various First Amendment Freedom of Religion arguments. As for their "Free Exercise" contention, it held that "[t]here is no restriction placed on plaintiffs' religious opinions or actions by granting benefits to veterans" (Pet. App. C, 23). The court noted that "in fact the purpose of the conscientious objector exemption [itself] is to allow selective service registrants to follow their religious beliefs where they conflict with the purpose of the military." *Ibid.* The court also rejected petitioners' contention under the "Establishment Clause" that the Act impermissibly supports religions represented by soldiers who have served on active duty. The court found *Gillette* v. *United States*, 401 U.S. 437, dispositive of that contention, since there this Court rejected a virtually identical "Establishment" challenge to the conscientious objector provisions themselves (Pet. App. C, 23-24).

of rights conferred upon the citizen by the Constitution."[3] The courts of appeals have consistently adhered to those principles and thus, like the court below here, sustained application of Section 211(a) even when constitutional claims have been alleged. *E.g., Ross* v. *United States,* 462 F. 2d 618 (C.A. 9), certiorari denied, No. 72–337 (Nov. 6, 1972); *de Rodulfa* v. *United States,* 461 F. 2d 1240 (C.A.D.C.), certiorari denied, October 24, 1972, No. 72–225; *Hoffmaster* v. *Veterans Administration,* 444 F. 2d 192 (C.A. 3); *Milliken* v. *Gleason,* 332 F. 2d 122, 123 (C.A. 1), certiorari denied, 379 U.S. 1002.

3. The dismissal of petitioners' actions was correct for the further reason that their various constitutional challenges to the Veterans Readjustment Benefits Act were insubstantial. The classification of beneficiaries under the Act—as the district court noted—has a reasonable basis and does not infringe petitioners' freedom of religion. Thus, there is neither a violation of the Fifth Amendment's Due Process Clause nor the First Amendment's Free Exercise or Establishment Clauses. Accordingly, denial of the request for a three-judge court was proper, *e.g., Ex parte Poresky,* 290 U.S. 30, 32, and dismissal of the actions was correct. *Lion Manufacturing Corp.* v. *Kennedy,* 330 F. 2d 833, 840–841 (C.A.D.C.), motion for leave to file petition

[3] In *Lynch*, this Court explained further that "[w]hen the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. * * * It may limit the individual to administrative remedies." *Id.* at 582.

for writ of mandamus denied (*sub nom. Lion Manufacturing Corp.* v. *McGuire*), 373 U.S. 920; *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 130 (C.A. 9), certiorari denied, 351 U.S. 946.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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The petitioners in this case are conscientious objectors who performed civilian alternative service in lieu of military service. They then sought from the Veterans Administration, but were denied, educational benefits under the Veterans Readjustment Benefits Act. The lower courts held that the bar to judicial review of Veterans Administration decisions in 38 U.S.C. 211(a) covers challenges to the constitutionality of statutes that the Veterans Administration administers, and described petitioners' claim that the denial of educational benefits to persons who performed civilian alternative service is unconstitutional as insubstantial. The petition challenges only the

ruling that Section 211(a) bars judicial consideration of the constitutional claim.

Following the filing of the government's brief in opposition in this case, the United States District Court for the District of Massachusetts in a similar suit, *Robison* v. *Johnson*, No. 72-434-G, held (1) that Section 211(a) does not bar a suit on this claim, and (2) that the statute is unconstitutional. (A copy of that court's opinion is attached to petitioners' reply brief in the present case.) The government is appealing the *Robison* decision directly to this Court under 28 U.S.C. 1252.

In the circumstances, we suggest that the Court should defer acting on the present petition until it considers the jurisdictional statement in *Robison*. If it notes probable jurisdiction of that appeal, we further suggest that it hold the present petition until it decides *Robison* and that it then dispose of it in accordance with that decision. *Robison*, in which the district court held the statute unconstitutional and refused to treat 38 U.S.C. 211(a) as a bar to judicial review of that question, appears the appropriate case for resolving the issues, and there appears to be no occasion for the Court to hear a second case which directly raises only the statutory issue.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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Sharp, Malcolm P., The Classical American Doctrine of "The Separation of Powers", 3 U.CHI. L.REV. 385 (1935) 13

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Strong, Frank R., Judicial Review: A Tri-Dimensional Concept of Administrative Constitutional Law, 69 W.VA.L.REV. 111, 250 (1967) 13

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The opinion of the District Court is
ported at 339 F.Supp. 913 (N.D.Calif.,1972).
e opinion of the 9th Circuit Court of Appeals
reported at 467 F.2d 479 (9th Cir.,1972).

JURISDICTION

The opinion and order sought to be reviewed
s entered on August 9, 1972 in Actions
o. 72-1655 and 72-1760 in the United States
ourt of Appeals for the 9th Circuit. A
etition for Writ of Certiorari was filed in
his Court on November 3, 1972 and the Petition
as granted by order entered May 14, 1973.
urisdiction in the United States Supreme
ourt is asserted pursuant to the provisions of
8 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May Congress, by enacting a statute
here 38 U.S.C. § 211(a)] which prohibits
review of administrative determinations, de-
prive the federal courts of jurisdiction to

hear an action challenging the constitutionality of a congressional enactment [here the Veterans Readjustment Benefits Act, 38 U.S.C. §§ 1651-1697]?

2. If an agency [here the Veterans Administration] is given exclusive jurisdiction to consider claims for benefits arising under a federal law [here the Veterans Readjustment Benefits Act], but that agency is unable or unwilling to consider a challenge to the constitutionality of that law, does due process require that a litigant be able to assert those claims in the federal courts?

3. Does 38 U.S.C. § 211(a), which provides that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans . . . shall be final . . ." preclude federal court jurisdiction over an action which asserts the unconstitutionality of a law administered by the Veterans Administration?

STATUTE INVOLVED

The applicable statute is 38 U.S.C. § 211(a), which provides as follows:

> On and after October 17, 1940, except as provided in §§ 775, 784 and as to matters arising under Chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependants or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

STATEMENT OF FACTS

Petitioners (plaintiffs below) are conscientious objectors, each of whom spent two years performing civilian work contributing to the maintenance of the national health, safety and interest ("alternative service") as required by 50 U.S.C. § 456(j). Each petitioner thereafter enrolled at an institution of higher learning and applied for educational benefits under the Veterans Readjustment

Benefits Act, 38 U.S.C. §§ 1651-1697 ("VRBA"). On the record below,[1] it is undisputed that petitioners qualified for benefits in every respect except that their alternative service as conscientious objectors did not qualify as "active duty" in the Armed Forces, which is made a condition of eligibility by 38 U.S.C. § 1652(a)(1).[2]

After their claim for benefits was denied by the Veterans Administration, petitioners filed this action in the United States District Court for the Northern District of California. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1361, 2201 and 5 U.S.C. §§ 702 et seq.

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[1] Since this action arises in the context of a successful Motion to Dismiss for Lack of Jurisdiction, the allegations of plaintiffs' complaint provide the pertinent factual record here, and must be taken as true. Zemel v. Rusk, 381 U.S. 1 (1965).

[2] The term "active duty" is defined by 38 U.S.C. § 101(2).

In their actions,[3] petitioners alleged that the statutory exclusion of conscientious objectors from eligibility for educational benefits is in violation of their rights under the First and Fifth Amendments to the Constitution.

On March 8, 1972, the district court dismissed petitioners' actions for lack of jurisdiction, and petitioners appealed. The district court's order of dismissal was thereafter affirmed by the Ninth Circuit Court of Appeals which held -- without reaching the merits of petitioners' constitutional claims -- that 38 U.S.C. § 211(a) deprives the federal courts of jurisdiction to consider petitioners' challenge to the constitutionality of portions of the VRBA. It is that holding that petitioners now ask this Court to review.

[3] Petitioners Hernandez, et al. and Miller, et al. initially filed independent actions. However, their suits, which raised substantially identical legal claims, were consolidated in the district court and were also considered jointly on appeal by the Ninth Circuit.

SUMMARY OF ARGUMENT

Petitioners, by this action, challenge the constitutional validity of certain portions of the Veterans Readjustment Benefits Act, 38 U.S.C. §§ 1651-1697. Having been denied relief by the Veterans Administration,[4] petitioners spught relief in federal court. The district court concluded that it lacked jurisdiction to consider petitioners' claims, and the Ninth Circuit Court of Appeals affirmed, relying on 38 U.S.C. § 211(a) ("§ 211(a)"), which withdraws from the courts jurisdiction to review certain decisions of the Veterans Administration relating to veterans' benefits.

The issue before this Court is whether § 211(a) should be applied to bar jurisdiction of petitioners' constitutional claims.

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[4] The Veterans Administration correctly concluded that it lacked jurisdiction to consider petitioners' constitutional arguments, and, in denying petitioners' claims, confined its analysis to the plain meaning of the challenged statutes.

etitioners submit that it should, and base his contention on three separate arguments. irst, application of § 211(a) to the present ase would deeply erode the doctrine of judi-ial review, a doctrine which has been basic o the workings of our government since arbury v. Madison, 5 U.S. 37 (1 Cranch 87) 1803). By allowing Congress to foreclose udicial inquiry into the constitutional alidity of Congressional enactments, it would estroy a key element in the system of checks nd balances which underlies a government ased on separation of powers.

No previous decision of this Court sanctions uch arrogation of power to the legislative ranch. While Congress does have the power o withdraw the consent of the United States o be sued, the courts have always honored the right to redress for constitutional wrongs y allowing plaintiffs to obtain relief in uits against individual officers. Larson v.

Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949). Again, the cases holding that Congress may limit the jurisdiction of the courts have invariably sanctioned such limitations only where it appeared that alternative remedies for deprivation of constitutional rights were available. Yakus v. United States, 321 U.S. 414, 442-444 (1944).

Second, application of § 211(a) here would deprive petitioners of fundamental due process rights. It is now well established that one who has a legitimate claim of entitlement to government benefits must be afforded the opportunity for a meaningful hearing. Board of Regents v. Roth, 408 U.S. 564 (1972); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). Petitioners have been given no hearing whatsoever on the merits of their claim.

Third, application of § 211(a) to the instant case contradicts the express language of the statute, and is unsupported by the

egislative history. Section 211(a) bars
review" of decisions of the Administrator
under any laws administered by the Veterans
dministration". Here, the Administrator has
endered no decision on petitioners' con-
titutional claims. More important, the issue
n this case does not arise "under" laws
dministered by the Veterans Administration,
ut rather challenges the validity of such
aws. Even if the statutory language were
mbiguous, § 211(a) should be given an inter-
retation which preserves its constitutionality
nd avoids unnecessary resolution of consti-
tutional issues. Oestereich v. Selective
Service Board No. 11, 393 U.S. 233, 238 (1968).

ARGUMENT

INTRODUCTION

Petitioners come into this Court having been denied any meaningful hearing on constitutional claims of undeniable substance and import.[5] The court below held that 38 U.S.C. § 211(a) ("§ 211(a)") compelled such a denial. The assumption implicit in that holding is that § 211(a) validly withdraws from the courts all jurisdiction to review administrative decisions on claims for veterans' benefits, even where those claims are based solely on asserted constitutional rights.

The position of the lower court amounts to the assertion that Congress may legitimately foreclose judicial review of the constitutionality of Congressional enactments. That proposition squarely contradicts the

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[5] The government itself urges that the constitutional issues posed here are significant ones. Johnson v. Robison, No. 72-1297, Jurisdictional Statement of Appellants at 5-8.

fundamental premises of judicial review and separation of powers. Moreover, to accept such Congressional power is to deny the core element of due process -- the right of the individual to be heard. The conclusion is clear: If § 211(a) bars judicial review in the present case, it cannot survive constitutional scrutiny.

I

PRINCIPLES OF JUDICIAL REVIEW AND SEPARATION OF POWERS DEMAND THAT THE COURTS RETAIN POWER TO SCRUTINIZE THE CONSTITUTIONAL VALIDITY OF CONGRESSIONAL ENACTMENTS.

Soon after our present system of government was established, this Court had occasion to determine whether the Constitution should be treated as merely a statement of principles or as the supreme law of the land, binding not only individual citizens and the states, but also the co-equal branches of federal government. In Marbury v. Madison, 5 U.S. 137 (1 Cranch 87)(1803), it chose to pursue the

latter course.[6] Since that time, the federal judiciary has recognized a continuing obligation to review legislative and executive actions to determine whether they were in conformity with the Constitution, and, if they were not, to declare them void. As Justice Jackson wrote at a crucial juncture in the history of the Court:

> "[W]e act in these matters not by authority of our competence, but by force of our commissions. We cannot . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed." West Virginia State Board of Education v. Barnett, 319 U.S. 624, 640 (1943).

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6/ The political and juridical thought of the time supported this decision. See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV.L.REV. 129-139 (1893).

see also Bivens v. Six Unknown Named Agents, 403 U.S. 390, 392, 394-395 (1971); cf., United States v. United States District Court, 407 U.S. 297 (1972).7/

The principle of judicial review extends beyond a mere assertion of power by the courts; it is based on recognition of the necessity for systemic checks and balances which utilize constitutional mandates to define and condition the separation of powers among co-equal branches of government.8/

/ / /

7/ The kind of judicial review established by Marbury v. Madison is constitutional review: Review by the courts of the constitutionality of legislative or executive acts. It should be distinguished from ordinary review by the judiciary of administrative action to determine whether such action was arbitrary or otherwise unjustified. See, Frank R. Strong, Judicial Review: A Tri-Dimensional Concept of Administrative Constitutional Law, 69 W.VA.L. REV. 111, 250 (1967).

8/ For a detailed treatment of the doctrine of separation of powers, see Malcolm P. Sharp, The Classical American Doctrine of "The Separation of Powers", 3 U.CHI.L.REV. 385 (1935).

In the words of an early and celebrated decision

> "[L]iving under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." Kilbourn v. Thompson, 103 U.S. 168, 199 (1881).

See also, Powell v. McCormick, 395 U.S. 486, 506, 549 (1969); United States v. Brown, 381 U.S. 437, 442 et seq. (1965); Springer v. Philippine Islands, 277 U.S. 189, 201 (1927).

The duty of constitutional review is of special significance where, as here, infringement of fundamental personal liberties is alleged. When it was contended in the first Congress that there would be no effective way to enforce the proposed Bill of Rights, Madison replied that the "independent tribunals of justice" would provide such a way. 1 Annals of Congress, 439 (1789). His confidence has

proven well-founded. As this Court recently stated:

> "[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." Reynolds v. Sims, 377 U.S. 533, 566 (1964).

In light of these principles, the argument that Congress can, if it chooses, deny petitioners an opportunity to present their constitutional claims in a court of law, is untenable. On such a premise, Congress could ignore constitutional limitations on its power with impunity. Precisely the opposite has always been thought true: that the government itself, like individual citizens, is subject to the dictates of the Constitution. Indeed, this Court has already served notice in language too plain to be mistaken that Congress may not, in the guise of regulating review of administrative action, exceed the limits on its own authority:

"Under our system, there is no warrant for the view that the judicial power of a competent court may be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." St. Joseph Stockyards Company v. United States, 298 U.S. 38, 52 (1936).9/

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9/ The principle of constitutional review is given recognition not only in the decisions of this Court, but also in the language of the Constitution itself. Article III, Section 1 of the Constitution provides that the judicial power of the United States "shall be vested", and further provides that the judicial power "shall extend to all cases in law and equity, arising under this Constitution . . . ." By virtue of this language, Congress must vest all the judicial power in some court. Martin v. Hunter's Lessee, 14 U.S. 304 (1 Wheat. 141)(1816); Murray's Lessee v. Hoboken Land and Improvement Company, 59 U.S. 272, 284 (18 How.) (1855); Eisentrager v. Forrestal, 174 F.2d 961, 966 (1949), reversed on other grounds, sub. nom. Johnson v. Eisentrager, 339 U.S. 763 (1950).

II

THE POWER OF CONGRESS TO MAKE ADMINISTRATIVE DETERMINATIONS FINAL MUST YIELD TO THE RIGHT OF PETITIONERS TO CHALLENGE UNCONSTITUTIONAL ENACTMENTS AND TO RECEIVE A MEANINGFUL HEARING ON THEIR CLAIMS.

Decisions upholding non-reviewability provisions like § 211(a) have relied on two separate lines of reasoning: First, the power of Congress to withdraw the consent of the United States to be sued; and second, the power of Congress to limit the remedies available to a claimant of government benefits.10/ Analysis of such reasoning, however, demonstrates that it in no way supports the contention that Congress may bar jurisdiction of the courts to consider the claims of petitioners here.

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10/ One or both of these theories underly all of the lower court decisions which apply to § 211(a). See, e.g., de Rodulfa v. United States, 461 F.2d 1240 (D.C.Cir.,1972) cert. den. U.S. , 93 S.Ct. 270 (1972); Redfield v. Driver, 364 F.2d 812 (9th Cir.,1966); cf., Lynch v. United States, 292 U.S. 571 (1934).

A. ASSUMING § 211(a) WITHDRAWS THE CONSENT OF THE UNITED STATES TO BE SUED, IT NONETHELESS DOES NOT BAR JURISDICTION HERE.

The doctrine of sovereign immunity first received the attention of this Court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in which the Court held that Georgia was subject to suit in federal court by a citizen of another state.[11/] The Chisholm decision, however, was swiftly reversed by passage of the Eleventh Amendment.[12/] Decisions after Chisholm assume the validity of sovereign immunity doctrine without extended discussion, and it

11/ Several members of the Chisholm Court doubted whether the doctrine should be transplanted from England to the new democracy. 2 U.S. at 453 et. seq. (opinion of Wilson, J.), 469 et. seq. (opinion of Jay, C. J.). Even in England, the doctrine had operated chiefly as a procedural device; in practice, relief against the sovereign was freely available. L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV.L.REV. 2-19 (1963).

12/ Chief Justice Marshall later observed that the motivation behind passage of the Eleventh Amendment was wholly practical: concern by the states over liability for debts incurred in the Revolutionary War. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406-407 (1821).

soon became the established rule that the United States was not subject to suit without the consent of Congress. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-412 (1821)(dicta); United States v. McLemore, 45 U.S. (4 How.) 286 (1846).13/

While the Court thus accepted the basic outlines of sovereign immunity doctrine, it recognized at the same time that the power of the government to set itself above the law was ultimately incompatible with a system which presupposed that the government could be held accountable for violations of the constitution. Accordingly, as early as 1824, the Court held that a state officer could be

13/ As this Court has noted, however, in application the doctrine has been productive of considerable confusion. Land v. Dollar, 330 U.S. 731, 738 (1947). Numerous commentators have pointed to this confusion in arguing that the doctrine of sovereign immunity is unjustified and leads to injustice, and should therefore either be modified or abandoned. See, e.g., K. Davis, Administrative Law Treatise (1970 Supplement) §§ 27.00 et. seq., and authorities cited.

enjoined from enforcing an unconstitutional statute. Osborn v. Bank, 22 U.S. (9 Wheat.) 738, 842-859 (1824). Over 50 years later, the Court turned its full attention to the issue, and squarely held that where sovereign immunity conflicts with the principle of government accountability to the Constitution, the former must yield:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority . . . .
>
> . . . Shall it be said, in the face of . . . the acknowledged right of the judiciary to decide in proper cases, statutes . . . to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property . . . without lawful authority . . . .
>
> If such be the law of this country, it sanctions a tyranny . . . ."

United States v. Lee, 106 U.S. 196 (1882).

To resolve the conflict between these two principles, the Court turned to the well established concept that acts of an officer of the government which violate the

onstitution are not acts of the sovereign.[14/] Thus, specific relief against unconstitutional actions could be obtained in a suit against the officer, and in such a suit the doctrine of sovereign immunity would be no bar. Ex parte Young, 209 U.S. 123 (1908). As the Court there stated:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity . . . . If the act which the State attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 159-160.

14/ Leading commentators both in England and this country acknowledged such a rule. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Book I, ch. 7, at 238-239; J. STORY, COMMENTARIES ON THE CONSTITUTION, § 1676 (3 ed., 1858), quoted in D. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U.COLO. L.REV. 1, 4, 19 (1972).

Accord, Georgia Railroad & Banking Company v. Redwine, 342 U.S. 299 (1952).[15/]

The rule stated in Ex parte Young was incorporated in what has become the definitive statement of sovereign immunity law, Larson v. Foreign and Domestic Commerce Corp., 337 U.S. 682 (1949). Having expressly stated that assertions of sovereign immunity must yield to the power of the courts to grant relief against unconstitutional actions of government officers (Id. at 704), the Larson Court reaffirmed the reasoning of Ex parte Young:

15/ Ex parte Young involved a suit against a state, so the decision also deals with the impact of the Eleventh Amendment to the Constitution. On its face, the Eleventh Amendment bars only suits by citizens of one state against another state. This language was originally given a strict interpretation. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Later cases, however, held that the Amendment was intended to bar all suits against a state, with certain limited exceptions. Hans v. Louisiana, 134 U.S. 1 (1890).

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. [Where] the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional . . ., the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign . . . . [In such a case,] a restraint may be obtained against the conduct of government officials." Id. at 689-690.

he same limitation on the doctrine of sov-
reign immunity is consistently recognized
n later cases. Dugan v. Rank, 372 U.S. 609,
21-622 (1963); Malone v. Bowdoin, 369 U.S.
43, 647-648 (1962).16/

16/ The suggestion was made in the Larson case hat even where unconstitutional action was lleged, a suit might fail where the granting f specific relief would place an intolerable urden on the government. Id. at 691, n. 11. hat proviso has not been repeated in later ormulations of the rule (see, e.g., Malone v. owdoin, supra, at 648.) However, taking it at ace value, the exception would apply only in he rare situation where the necessity of proiding a remedy for unconstitutional acts by overnment officials was overridden by some ompelling governmental interest. See L. Jaffe, uits Against Governments and Officers: Sovereign Immunity, 77 HARV.L.REV. 1, 34-36 (1963); tate of Washington v. Udall, 417 F.2d 1310 9th Cir.,1969). No such governmental interest xists here.

Viewed in this context, occasional statements in decisions of this Court to the effect that Congress may deny individuals the right to sue the government for alleged violation of constitutional rights take on a much different meaning. Of particular importance in this regard is Lynch v. United States, 292 U.S. 571 (1934), a case often relied on by courts applying § 211(a). In Lynch, the Court held that beneficiaries of War Risk Insurance were entitled to recover insurance proceeds despite passage of a law designed to bar such recovery. The precise issue at stake in Lynch did not require consideration of the doctrine of sovereign immunity; however, Justice Cardozo observed in dicta that sovereign immunity ". . . applies alike to causes of action arising under acts of Congress [citations], and to those arising from some violation of rights conferred upon the citizen by the Constitution . . . ." Id. at 582.

Taken at face value, the above statement might suggest that an assertion of sovereign immunity limits the availability of constitutional review. However, the language quoted must be read in light of Ex parte Young and Larson. Those cases teach that an action directed against an unconstitutional statute may proceed against the sovereign only with its consent, but may always proceed against the individual officers charged with enforcement of the statute.17/

The reasoning of Ex parte Young and Larson, and of the unbroken line of cases which preceded and followed them, is controlling here. Thus, even if § 211(a) can be construed as removing the consent of the United States to be sued, it does not prevent the instant

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17/ In Lynch, no individual defendants were named, so the Court had no occasion to address this point. Were the Lynch dicta construed to sanction denial of jurisdiction over individual defendants acting in an unconstitutional manner, it would be a misstatement of the law.

suit from proceeding against the individual defendants.[18/]

B. IF § 211(a) IS CONSTRUED TO APPLY TO THIS CASE, IT DENIES PETITIONERS DUE PROCESS OF LAW.

The due process clause of the Fifth Amendment expressly limits the powers of the federal government vis-a-vis the individual by providing procedural guarantees which protect the individual from arbitrary government action. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971). The extent to which such guarantees limit the power of Congres

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18/ Petitioners contend that the action should also proceed against the United States and the Veterans' Administration as proper parties defendant to this lawsuit, on the basis that § 211(a) has no applicability here, and that the United States has in fact given its consent to this suit by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1361, and 5 U.S.C. § 704 et seq.

over the jurisdiction of the federal courts has never been squarely resolved by this Court.[19] However, this Court has never

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19/ The Court has indicated that "judicial review may indeed be required by the Constitution . . . ." Estep v. United States, 327 U.S. 114, 120 (1946). In Yakus v. United States, 321 U.S. 414, 444 (1944), the Court permitted an administrative tribunal to assume primary responsibility for the finding of facts, ". . . so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process . . . ." See also, Ng Fung Ho v. White, 259 U.S. 276 (1922).

Lower courts have held that the power of Congress to exercise control over jurisdiction of the federal courts must be subject to the limitations of the due process clause. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2dCir.,1948), cert. den., 335 U.S. 887 (1948); Petersen v. Clark, 285 F.Supp. 700 (N.D.Calif.,1968), reversed on other grounds, 411 F.2d 1217 (9thCir.,1969); Gabriel v. Clark, 287 F.Supp. 369 (N.D.Calif.,1968), reversed on other grounds sub. nom., Clark v. Gabriel, 393 U.S. 256 (1968). See also L. Jaffe, Judicial Control of Administrative Action (1965), at 321 (". . .The availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity . . . .")

held that Congress may limit the jurisdiction of the federal courts where, as here, the effect is to deny the individual any opportunity to present his claim.20/

In determining the application of due process concepts to the present case, the first question to be resolved is whether petitioners are entitled to the protections of procedural due process. The "right-privilege" distinction

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20/ Only where the individual has another forum in which to seek an effective remedy have substantial limitations on judicial review been upheld. See Ex parte McCardle, 74 U.S. 506 (1869); Yakus v. United States, 321 U.S. 414, 442-444 (1944). In these cases, compelling government interests justified the restriction on review. Yakus v. United States at 442-443. Similarly, compelling governmental interests may justify summary government action, but only if that action is subject to review at a later time. Ewing v. Mytinger and Casselberg, Inc., 339 U.S. 594 (1950); Anderson National Bank v. Luckett, 321 U.S. 233, 246-247 (1944); Phillips v. Commissioner, 283 U.S. 589

hich once would have controlled this question as now been firmly rejected.[21] E.g., raham v. Richardson, 403 U.S. 365 (1971); oldberg v. Kelly, 397 U.S. 254, 261-263 (1970).

Instead, recent decisions of this Court dopt a more flexible and realistic standard or determining when claims for benefits must e accorded due process protections. The elevant guidelines are set forth in the com- anion cases of Board of Regents v. Roth, 08 U.S. 564 (1972), and Perry v. Sindermann, 08 U.S. 593 (1972). In Roth, a nontenured niversity professor who was not rehired after his one-year contract expired was held not to have a protectable interest in his job and, therefore, no right to a hearing. Roth, supra, at 578. In Sindermann, this

21/ Lower court cases dealing with § 211(a) have generally dismissed any assertion of due process rights on precisely such grounds. E.g., Redfield v. Driver, 364 F.2d 812, 813 (9th Cir.,1966), relied on by the courts below.

Court held that if Mr. Sindermann, also a nontenured professor, could prove his allegation of de facto entitlement to job tenure, he would be entitled to a hearing which satisfied the requirements of due process. Sindermann, supra, at 601-603.

Taking Sindermann and Roth together, the following test emerges: In order to have a "property" interest protected by the due process clause, "a person must have more than an abstract need or desire for it . . . . He must, instead, have a legitimate claim to entitlement to it". Roth, supra, at 577. The claim of entitlement is derived from existing rules or understandings that stem from an independent source. Id. at 577.[22/]

22/ Unlike the plaintiffs in Roth and Sindermann petitioners do not already have the benefits to which they claim entitlement. Such a distinction, however, does not defeat the right to procedural due process, as Roth makes clear. Id. at 577. See also, Shapiro v. Thompson, 394 U.S. 618 (1969)(claim for welfare benefits); Sherbert v. Verner, 374 U.S. 398 (1963)(claim for unemployment insurance benefits).

Under the Roth/Sindermann rationale, petitioners are entitled to due process protection. Petitioners' claim of entitlement to educational benefits stems from two independent sources of law: the federal statute itself, and the Constitution. The existence of a law granting benefits to some is the necessary predicate of any claim. Cf., Bell v. Burson, 402 U.S. 535, 539 (1971). The subordination of that law to pertinent constitutional restraints supports a legitimate claim to those benefits. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); and Shapiro v. Thompson, 394 U.S. 618 (1969).23/

23/ In fact, due process guarantees are doubly important where the claimed entitlement is based on asserted constitutional rights, for then the denial of procedural safeguards may entail denial of the substantive constitutional right. Speiser v. Randall, 357 U.S. 513 (1958); see generally W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV.L.REV., 1439, 1453 et seq. (1968).

Having established that petitioners' claim for veterans' benefits is a protectable "property" interest, it is readily apparent that application of § 211(a) in this case has resulted in denying petitioners the process due them. The most fundamental requisite of procedural due process is the opportunity to be heard. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); Grannis v. Ordean, 235 U.S. 385, 394 (1914). Cf., Vlandis v. Kline, ___ U.S. ___, 93 S.Ct. 2230, 2236 (1973). The hearing must be at a meaningful time and in a meaningful manner, and must be appropriate to the nature of the case. E.g., Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Armstrong v. Manzo, supra; Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1949).

Petitioners here have never had such a hearing. Although petitioners were permitted to present their claim for benefits to the Veterans Administration, that "hearing" never addressed the constitutional claims on which petitioners base their claim.[24/] Compare Public Utilities Commission v. United States, 355 U.S. 534, 540 (1958)(judicial review is the only effective way of protecting an asserted constitutional right).

24/ The Veterans Administration has recognized that it does not have jurisdiction to determine the constitutional issues raised by petitioners. Appeal of Peter Sly, Board of Veterans Appeal Docket No. 72-074-21 (1972), reprinted in petitioners' Petition for Writ of Certiorari, App. B. The Constitution prohibits an administrative agency from adjudicating the constitutionality of Congressional enactments. Article III, § 1 provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . ." Compare Marbury v. Madison, 5 U.S. 137, 176 (1 Cranch 87, 111)(1803)("It is emphatically the province and duty of the judicial department to say what the law is.") Even if an administrative agency did have authority to declare an act of Congress unconstitutional, it would never exercise such power to declare its own statute unconstitutional. Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958); Oestereich v. Selective Service Board No. 11, 393 U.S. 233, 242 (1968)(concurring opinion of Justice Harlan).

Thus, any hearing which petitioners have had until now was wholly illusory, and therefore incompatible with the requirements of due process.[25] See Bell v. Burson, 402 U.S. 535, 541-542 (1971).[26] Compare DeJonge v. Oregon, 299 U.S. 353, 362 (1937).

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25/ By comparison, the plaintiffs in previous lawsuits involving § 211(a) have always had a hearing appropriate to the nature of their claim. See, e.g., Redfield v. Driver, 364 F.2d 812 (9th Cir.,1966); Milliken v. Gleason, 332 F.2d 122 (1st Cir.,1964), cert. den., 379 U.S. 1002 (1965); Barefield v. Byrd, 320 F.2d 455 (5th Cir.,1963).

26/ In Bell v. Burson, 402 U.S. 535 (1971), a state statute providing for a "hearing" prior to the suspension of the drivers' license of an individual unable to post security for damages following an automobile accident. Even though the question of fault or liability was a crucial factor in revoking licenses under the statute, evidence as to fault was not permitted at the hearing. This Court held the statute to be in violation of the due process clause. Id. at 541-542.

III

REASONABLY CONSTRUED, § 211(a) DOES NOT DEPRIVE THE COURTS OF JURISDICTION TO CONSIDER LAWSUITS CHALLENGING THE CONSTITUTIONALITY OF STATUTES PERTAINING TO VETERANS' BENEFITS.

Interpreting § 211(a) to bar jurisdiction of this action is contrary to the plain language of the statute and finds no support in the legislative history. Furthermore, such a construction would require this Court to reach the serious constitutional issues raised above. In light of this Court's policy of construing statutes to avoid unnecessary resolution of constitutional issues; see, e.g., United States v. 37 Photographs, 402 U.S. 363 (1971); Oestereich v. Selective Service Board No. 11, 393 U.S. 233, 238 (1968), § 211(a) should not be so construed.

As amended, 38 U.S.C. § 211(a) reads as follows:

> On and after October 17, 1940, except as provided in §§ 775, 784 and as to matters arising under chapter 37 of this title [not material here], the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Careful examination of this language shows that § 211(a) has no bearing on petitioners' lawsuit. Petitioners' are not seeking review of a decision rendered by the Veterans Administration: the Veterans Administration has refused to consider the constitutional issues presented on the grounds that it lacks jurisdiction over such matters.[27/] Moreover, the issues for resolution herein do not involve "[a] question of law or fact under [a] law administered by the Veterans Administration;" rather, petitioners' lawsuit challenges the constitutional validity of such a law. See

27/ See note 24, supra at p. 33.

Robison v. Johnson, 352 F.Supp. 848, 853 (D.Mass.,1973); prob. juris noted sub.nom. Johnson v. Robison, 72-1297; Greene v. Board of Veterans Appeals, ___ F.Supp. ___ (N.D. Calif.,1973).

Nor does the legislative history of § 211(a) and its predecessors establish any intent to deprive the courts of jurisdiction in lawsuits challenging the constitutionality of statutes governing veterans' benefits. When the United States Veterans Bureau was created by Congress in 1921, Act of August 8, 1921, ch. 57, 42 Stat. 147, there was no provision limiting judicial review of the agency's decisions. Three years later, Congress enacted the World War Veterans Act of 1924. Section 5 of that Act provided:

> The director . . . shall decide all questions arising under this Act, and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive except as otherwise provided herein. Act of June 7, 1924, ch. 320, 43 Stat. 608 (1924).

Ironically, this finality provision apparentl was inserted to protect the individual receiving benefits. Under the prior law, the Comptroller General of the Treasury had authority to determine that benefits had beer erroneously paid by the Veterans Bureau, and could direct the Veterans Bureau to file lawsuits against beneficiaries to recover such benefits. See 65 Cong. Rec., at 10229, 10231 (1924)(Remarks of Mr. Milligan and Mr. Thompson).28/

Thereafter, the finality clause was amend to closely resemble the current § 211(a):

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28/ The finality clause in the 1924 Act was interpreted by the Supreme Court to prohibit judicial review of the Director's decision, ". . . unless the decision is wholly unsupported by the evidence, or is wholly depende upon a question of law, or is seen to be clearly arbitrary and conpricious". Silberschein v. United States, 266 U.S. 221, 225 (1924). Accord, Crouch v. United States, 266 U.S. 180 (1924); United States v. Willia 281 U.S. 271 (1930).

> All decisions rendered by the Administrator of Veterans Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official of the United States shall have jurisdiction to review by mandamus or otherwise any such decision. Act of March 20, 1933, ch. 3, 48 Stat. 9.

The 1933 amendment was apparently enacted to preclude review even under the special circumstances delineated in Silberschein v. United States, 266 U.S. 221, 225 (1924) (supra, note 28). See Lynch v. United States, 292 U.S. 571, 587 (1934). There is no evidence, however, that Congress intended the section to apply to claims challenging the validity of the laws relating to benefits.

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The final major amendment came in 1970,[29] when Congress deleted an ambiguous phrase for the express purpose of overruling certain lower court decisions which had held that § 211(a) did not bar review of decisions involving "termination" of benefits, as oppos to "claims" to benefits. 116 Cong. Rec. at 19736 (1970)(remarks of Mr. Saylor, co-sponsor of the bill); 116 Cong. Rec. at 26489-26490 (1970)(remarks of Mr. Teague);

29/ There were minor changes in 1940 (54 Stat 1197), 1957 (71 Stat. 92) and 1958 (72 Stat. 1115), but in none of these instances was there an attempt to alter the meaning of the provision. E.g., 104 Cong. Rec., at 2251, 2253 (1958)(remarks of Chairman Teague); Sen. Rep. No. 332, 85th Cong. 1st Session (1957); H.R. Rep. No. 279, 85th Cong., 1st Session (1957). Throughout this period Congress appeared to operate on the assumption then prevalent in the law that it could regulate the right to gratuities in any way whatsoever, without regard to due process or other constitutional considerations. See 86 Cong. Rec. at 13491 (1940) (remarks of Mrs. Rogers); 86 Cong. Rec., at 13383 (1940)(remarks of Mr. George). See F. Davis, Veterans' Benefits, Judicial Review and the Constitutional Problems of Positive Government, 39 IND.L.J. 183 (1964)(concluding that § 211(a) is unconstitutional on its fact).

letter from Donald Johnson, Administrator of the Veterans Administration, dated June 9, 1970, cited in H.R. Rep. No. 91-1166, 91st Congress, 2nd Session, at 19-24 (1970).30/

What this brief review demonstrates is the intent of Congress to finalize all decisions of the Administrator involving "non-contractual" claims. See 116 Cong. Rec. at 26489-26490 (1970)(remarks fo Mr. Saylor). In no way, however, does it support the claim that § 211(a) was meant to apply to the present kind of case.

30/ Prior to August 12, 1970, 38 U.S.C. § 211(a), 72 Stat. 1115 (1958) provided as follows:

> "Except as provided . . . the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans Administration shall be final and conclusive . . . ."

The 1970 amendment removed the underlined language. The old version was admittedly ambiguous on whether the Administrator's decision on the constitutional validity of a given statute was meant to be final and conclusive on the courts, since the phrase "under any law administered . . ." apparently modified the words "benefits or payments". The amended version thus clarifies the Congressional intent.

Even assuming some ambiguity, the only reasonable construction of § 211(a) is that urged by petitioners. It is a fundamental tenet of administrative law that courts should defer to the judgment of an administrative agency in areas of an agency's special competence, and petitioners' interpretation of § 211(a) gives full recognition to that principle. To go further, however, and suggest that Congress meant to cut off from judicial supervision even the function of constitutional adjudication, is to suggest that Congress meant to promote judicial deference with respect to questions where agency incompetence rather than competence is the rule.[31/]

The distinction urged here is between review of a decision made under statutory authority and review of a decision (or rather, of a refusal to decide) on the validity of a

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31/ See n. 24, supra, at 33.

statute itself. In the latter situation, every effort should be made to construe statutory language in favor of reviewability. Oestereich v. Selective Service Board No. 11, 393 U.S. 233, 238 (1968); Leedom v. Kyme, 358 U.S. 184, 188-189 (1958); Fay v. Douds, 172 F.2d 720, 723 (2d Cir.,1949).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request this Court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

SUPREME COURT OF THE)
)
UNITED STATES)

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that a copy of the foregoing Brief of Petitioners was mailed today to the following attorneys as counsel for respondents:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Dated: July 27, 1973.

Richard L. Goff
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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 72-709

In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY HERNANDEZ, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-700

HENRY HERNANDEZ, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (Pet. App. C) is reported at 339 F. Supp. 913. The opinion of the court of appeals (Pet. App. A) is reported at 467 F. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1972. The petition for a writ of certiorari was filed on November 7, 1972, and was

granted on May 14, 1973.[1] This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory prohibition against judicial review of the decisions of the Veterans Administration bars review of the contention that the statute under which the Veterans Administration denied educational benefits to petitioners is unconstitutional.

2. Whether, in any event, the dismissal of petitioners' actions was correct since their constitutional challenges to the Veterans Readjustment Benefits Act were insubstantial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

38 U.S.C. 211(a), as amended, provides:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters

[1] The Court's order also sets the present case for argument with No. 72-1297, *Johnson* v. *Robison*.

arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. 1652(a)(1) provides:

The term "eligible veteran" means any veteran who (A) served on active duty for a period of more than 180 days any part of which occurred after January 31, 1955, and who was discharged or released therefrom under conditions other than dishonorable or (B) was discharged or released from active duty after such date for a service-connected disability.

38 U.S.C. 1661(a) provides:

Except as provided in subsection (c) and in the second sentence of this subsection, each eligible veteran shall be entitled to educational assistance under this chapter for a period of one and one-half months (or the equivalent thereof in part-time educational assistance) for each month or fraction thereof of his service on active duty after January 31, 1955. If an eligible veteran has served a period of 18 months or more on active duty after January 31, 1955, and has been released from such service under conditions that would satisfy his active duty obligations, he shall be entitled to educational assistance under this chapter for a period of 36

months (or the equivalent thereof in part-time educational assistance).

38 U.S.C. 101(21) provides, in pertinent part:

> The term "active duty" means—
> (A) full-time duty in the Armed Forces, other than active duty for training;
>
> * * * *

STATEMENT

Petitioners were exempted as conscientious objectors from induction into the armed forces, and performed civilian alternative service pursuant to Section 6(j) of the Selective Service Act, 50 U.S.C. App. 456(j), and the governing regulations of the Selective Service System, 32 C.F.R. Part 1660 (1971).[2] Upon completion of that service, petitioners sought educational benefits pursuant to the Veterans Readjustment Benefits Act of 1966, 38 U.S.C. 1651-1687. The Veterans Administration denied benefits since,

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[2] Section 6(j) of the Selective Service Act recognizes two kinds of conscientious objectors:

1. Persons who, while opposed to participation in war, may be inducted into the armed forces to perform noncombatant service (see 32 C.F.R. 1622.11).

2. Persons who, in addition to their opposition to participation in war, also oppose noncombatant service. They are not subject to induction into the armed forces but may be required to perform civilian work ("alternative service") that contributes to "the maintenance of the national health, safety, or interest * * *" (see 32 C.F.R. 1622.14, 1622.16).

All references herein to C.F.R. are to the 1971 edition, which contains the regulations in effect during petitioners' alternative service.

under the Act, they can be paid only to veterans who have served on active duty. 38 U.S.C. 1652(a)(1), 101(2) and (21).

Petitioners then instituted the present actions to compel payment to them of the educational benefits available to veterans. They contended that the Act violates due process in not providing benefits to them, while providing such benefits to veterans who have served on active duty in the armed forces; they further argued that the statute abridges their freedom of religion as guaranteed by the First Amendment (R. 8; Miller Compl. p. 6, para. VII(6)). Petitioners sought, *inter alia*, declaratory and injunctive relief, and requested the convening of a three-judge court.

The district court dismissed the actions (Pet. App. C), holding that judicial review of the Veterans Administration determinations of petitioners' ineligibility for benefits was explicitly precluded by 38 U.S.C. 211(a). That Section provides that "decisions of the Administrator on any question of law or fact * * * shall be final and conclusive and no * * * court of the United States shall have power or jurisdiction to review any such decision * * *." The court further found that petitioners' various constitutional challenges to the Veterans Readjustment Benefits Act were "insubstantial and without merit" and thus did not warrant the convening of a three-judge court (Pet. App. C 24).[3]

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[3] The district court rejected petitioners' due process challenge to the Act since the "classification scheme is neither arbitrary or unreasonable" (Pet. App. C 23). The court

The court of appeals affirmed the dismissal of the action for lack of jurisdiction under 38 U.S.C. 211 (a), stating (Pet. App. A 16):

> Assuming without deciding that the Veterans Administration might take an action so egregiously discriminatory and procedurally unfair as to require a judicial re-examination of the constitutionality of the quoted section, the facts alleged in the present case do not present a substantial basis for challenging the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our brief in the companion case, *Johnson* v. *Robison*, No. 72-1297, explains why 38 U.S.C. 211(a) validly bars judicial consideration of petitioners' constitutional challenges to the Veterans Readjustment

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observed that soldiers on active duty in the armed forces are subject to greater potential for hazardous duty and far greater limitations on personal freedoms (Pet. App. C 22-23). In addition, the court viewed the limitation of the educational benefit program to veterans of active duty as a reasonable method by which Congress could encourage enlistments (Pet. App. C 23).

The court also rejected petitioners' various First Amendment arguments. It held that "[t]here is no restriction placed on plaintiffs' religious opinions or actions by granting benefits to veterans. In fact the purpose of the conscientious objector exemption is to allow selective service registrants to follow their religious beliefs where they conflict with the purpose of the military" (Pet. App. C 23). The court also rejected petitioners' contention that the Act impermissibly supports religions represented by soldiers who have served on active duty. It found *Gillette* v. *United States*, 401 U.S. 437, dispositive of that contention, since there this Court rejected a virtually identical challenge to the conscientious objector provisions themselves (Pet. App. C 23-24).

Benefits Act. The discussion herein will therefore be limited to petitioners' arguments that are not fully covered in our *Robison* brief. We stress, however, that here, as in *Robison*, the Court may rest its decision on the insubstantiality of petitioners' constitutional arguments without considering the applicability of 38 U.S.C. 211(a) to these cases. Both courts below found the constitutional claims to be without merit.

We rely upon our brief in *Robison* to demonstrate that the language and legislative history of Section 211(a) indicate that it bars judicial consideration of the constitutionality of the Veterans Readjustment Benefits Act. Moreover, such preclusion of judicial review is also supported by the principle of sovereign immunity; the exception to that principle permitting suits to prevent federal officials from exercising powers which are constitutionally void does not apply here, since the relief sought would require affirmative action by the sovereign and the disbursement of sovereign property (*Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 691). In any event, the Act is not constitutionally void.

Petitioners have not been denied any hearing to which they are entitled under the Due Process Clause. They presented no disputed questions of fact bearing on their eligibility for benefits, and thus suffered no injury because no evidentiary hearing was held. In any event, the right asserted by petitioners is not one within the Fifth Amendment's protection of liberty and property, as defined by this Court in *Board of*

Regents v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593. Since the statute and regulations did not provide veterans benefits for petitioners, they did not have the reasonable expectation of receiving them which *Roth* and *Sindermann* indicate is essential to create property interests protected by the Fifth Amendment.

As shown in our *Robison* brief, the congressional decision to limit educational benefits to veterans of active duty has a rational basis, and thus does not deny petitioners equal protection of the laws in violation of the Fifth Amendment. Petitioners' contentions that their First Amendment right to the free exercise of religion is violated by denying them benefits granted to veterans, and that the Veterans Readjustment Benefits Act violates the First Amendment prohibition against any "law respecting an establishment of religion" are fully answered by this Court's opinion in *Gillette* v. *United States*, 401 U.S. 437.

ARGUMENT

I. 38 U.S.C. 211(a) REQUIRED DISMISSAL OF THIS SUIT.

Section 211(a) precludes judicial review of "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans * * *." Petitioners contend that this provision does not cover constitutional challenges to such statutes. As petitioners themselves note, however, before the 1970 amendment the statute referred to "any question of law or fact concerning a claim for benefits or

payments under any law administered by the Veterans' Administration" (38 U.S.C. (1964 ed.) 211 (a)). The Administrator's decision denying benefits to petitioners was a determination of a question of law concerning a claim for benefits under a law administered by the Veterans Administration. Thus, even prior to its amendment in 1970, Section 211(a) would have barred judicial review of petitioners' constitutional contentions.

The 1970 amendment was intended to broaden, not to narrow, the limitations upon judicial review contained in Section 211(a). (See our brief in *Robison*, pp. 21-25.) The 1970 amendment was intended to "make it perfectly clear that the Congress intends to exclude from judicial review all determinations with respect to noncontractual benefits for veterans and their dependents and survivors." H. Rep. No. 91-1166, 91st Cong., 2d Sess., pp. 10-11.

Petitioners cannot avoid the bar of Section 211(a) on the theory that they are not raising a question "under" the Veterans Readjustment Benefits Act. The denial of benefits to petitioners was a decision that they are not entitled to benefits "under" that Act, and the benefits they seek to obtain in this suit similarly would be paid "under" that Act. The decision denying benefits is no less one rendered "under" that Act because it is subsequently challenged on the ground that the Act is unconstitutional.

A. Petitioners first urge that Congress may not constitutionally withhold from the courts jurisdiction to consider their constitutional claims, since such

action would violate the separation of powers.[4] We discuss in our brief in *Robison* (at pages 25-28) the permissible limitations on judicial review when administrative action involves no assertion of power over an individual, either to compel his compliance with a duty or to deprive him of liberty or property. Petitioners' argument that there may be no such limitations is based upon the assumption that Congress is obliged to confer on the courts all of the judicial power granted by the Constitution (Pet. Brief 16, n. 9).

This Court long ago decided otherwise (*Sheldon* v. *Sill*, 8 How. 441, 448-449):

> * * * And it would seem to follow, also, that having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.
>
> * * * * *
>
> "The political truth is, that the disposal of the judicial power (except in a few specified in-

[4] Of the cases cited by petitioners in support of this proposition, only *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, considers the power of the legislature to preclude judicial review of administrative actions; the administrative order there challenged fixed maximum rates for the company's services. The Court emphasized that "a large capital investment is involved and the main issue is as to the alleged confiscation of that investment." *Id.* at 49. This case, however, involves merely petitioners' desire to obtain benefits granted by Congress only to veterans of active duty.

stances) belongs to Congress; and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant." This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in *McIntire* v. *Wood*, 7 Cranch, 506; *Kendall* v. *United States*, 12 Pet., 616; *Cary* v. *Curtis*, 3 How., 245.

Martin v. *Hunter's Lessee*, 1 Wheat. 304, cited by petitioner, contains earlier dicta inconsistent with this conclusion.[5] The difficulties with taking the discussion in *Martin* v. *Hunter's Lessee* as an accurate statement of the law are identified in Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 313-315 (2d ed., 1973). The authors note that even Justice Story, the author of the opinion in *Martin* v. *Hunter's Lessee*, did not believe that there was any self-executing constitutional grant of jurisdiction, citing *White* v. *Fenner*, 29 Fed. Cas. No. 17,547 (C.C. R.I.) ("this [circuit] Court has no jurisdiction which is not given by some statute").

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[5] If petitioners' contention were correct, it would be unnecessary to identify any affirmative statutory basis for jurisdiction, since Congress would be without power to withhold jurisdiction in any case in which a constitutiional violation was alleged. But even in the absence of the explicit bar of Section 211(a), the court below would not have had jurisdiction in the absence of a statutory grant thereof. The district court in *Robison* made no finding concerning such a grant (see our brief in *Robison*, pp. 27-28, n. 25). Since the court below correctly relied on Section 211(a), it did not reach that issue.

B. The preclusion of judicial review is separately sustainable here under the principle of sovereign immunity. See *Lynch* v. *United States*, 292 U.S. 571. Petitioners seek to compel payment to them of federal funds under a federal statutory scheme which precludes judicial review. This is, therefore, an unconsented suit against the sovereign. *Land* v. *Dollar*, 330 U.S. 731, 738. Petitioners cannot obtain the relief they seek against the government from the courts. *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Hawaii* v. *Gordon*, 373 U.S. 57; *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141-143.

Petitioners contend (Br. 18-26) that their suit comes within the exception to sovereign immunity for suits against a governmental officer who acts under an unconstitutional statute. This Court explained the exception in *Larson* v. *Domestic and Foreign Corp.*, *supra*, 337 U.S. at 701-702, as follows:

> [T]he action of an officer of the sovereign (be it holding, or otherwise affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

See also *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Dugan* v. *Rank*, 372 U.S. 609, 621-622.

This exception is inapplicable to this case. This Court pointed out in *Larson* that "a suit may fail,

as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson* v. *Domestic and Foreign Corp.*, *supra*, 337 U.S. at 691, n. 11. See also the dissenting opinion of Mr. Justice Frankfurter, 337 U.S. at 712-716, analyzing the cases involving the exception, and noting that it does not apply to cases in which the relief requested would mean that "Government property would have to be transferred, or cases where the person sued could satisfy the court decree only by acting in an official capacity." *Id.* at 713. Here, the petitioners seek affirmative relief—payment of educational benefits—which requires the disposition to them of "unquestionably sovereign property"—that is, federal funds which Congress has not directed to be paid to them.* Furthermore, the Administrator could satisfy a decree ordering him to pay benefits to petitioners only by acting in his official capacity.

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* This case is thus very different from the cases relied upon by petitioner, such as *United States* v. *Lee*, 106 U.S. 196, which involve allegations of unconstitutional governmental interference with plaintiffs' private property. This Court has emphasized that difference by limiting *Lee* to situations involving claims of "an unconstitutional taking of property without just compensation." *Malone* v. *Bowdoin*, *supra*, 369 U.S. at 648, citing *Larson* v. *Domestic and Foreign Corp.*, *supra*, 337 U.S. at 697.

In any event, there is no basis for petitioners' contention that the Administrator is acting under an unconstitutional statute. The Veterans Readjustment Benefits Act satisfies both the First and Fifth Amendments (see *infra*, pp. 18-23).[7] Since the Administrator's exercise of his statutory powers is not constitutionally void, the exception does not apply. See *Dugan* v. *Rank*, 372 U.S. 609, 621-622.

C. Petitioners further contend, relying upon this Court's rulings in such cases as *Goldberg* v. *Kelly*, 397 U.S. 254, *Board of Regents* v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593, that application of Section 211(a) denies them a hearing in violation of the Due Process Clause of the Fifth Amendment.

The hearing contemplated in those cases, however, is an evidentiary hearing, which is required where "important decisions turn on questions of fact." *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 269. See also

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[7] Consideration of the merits of the constitutional question is, strictly speaking, somewhat inconsistent with Section 211(a). However, this procedure is similar to the preliminary decision which a district court must make in determining whether a case presents a substantial constitutional question which would require a three-judge district court. In addition, this practical approach is a logical corrolary to the principles of the *Larson* case. Cf. *Land* v. *Dollar*, *supra*, 330 U.S. at 735. Compare also *Delaware Valley Conservation Association* v. *Resor*, 392 F.2d 331, 335 (C.A. 3), certiorari denied, 393 U.S. 915, where the court stated that "[t]he mere allegation of unconstitutional actions * * * does not deprive the court of its authority to dismiss a complaint since the court must examine those allegations and order dismissal where they are wholly without merit."

Mills v. *Richardson*, 464 F. 2d 995, 1001 (C.A. 2). Here, there are no disputed questions of fact which bear on petitioners' eligibility for benefits. The issue is solely one of law, and neither the Veterans Administration nor the courts would have been aided in deciding whether petitioners were entitled to benefits by the development of facts at an evidentiary hearing. Indeed, petitioners point to no relevant facts they were precluded from presenting to the Administration because of the lack of a hearing.[8]

In any event, petitioners' invocation of the Due Process Clause is misplaced. The right petitioners assert—to educational benefits—is not within the protection of that Clause.

This Court recently stated that "to determine whether due process requirements apply in the first place, we must look * * * to the *nature* of the interest at stake. We must look to see if the interest is within the [Fifth] Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (emphasis in original). Accord, *Perry* v. *Sindermann*, 408 U.S. 593, 599. Petitioners assert that their claim of entitlement to educational bene-

[8] If petitioners had any facts bearing on their claim, they could have presented those facts in affidavits or other documentary form. This Court has never indicated that procedural due process requires a full hearing simply because the actions involved affect individual interests. Instead, it has specifically recognized the "constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." *Communications Commission* v. *WJR*, 337 U.S. 265, 276.

fits constitutes a sufficient property interest to bring them within the Fifth Amendment's protection, relying on *Roth* and *Sindermann*. But those cases teach that (*Roth, supra*, 408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg* v. *Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Accord, *Perry* v. *Sindermann, supra*, 408 U.S. at 601, 602, n. 7.

The employment rights of the teachers involved in both *Roth* and *Sindermann* were defined by the terms of their contracts and the policies of the universities at which they taught. Since in *Roth* there was nothing in the contract or "anything approaching a 'common-law' of re-employment" (*Roth, supra,* 408 U.S. at 578, n. 16) in the university policies, Roth had no property interests subject to constitutional protection. In *Sindermann,* there were allegations of "rules and understandings, promulgated and fostered by state officials" (*Sindermann, supra,* 408 U.S. at 602), which would constitute an implied contract to rehire sufficient to create a constitutionally protected property interest. The difference between the two cases is thus precisely that, although Roth had "an abstract concern in being rehired" (*Roth, supra,* 408 U.S. at 578), he could show no property interest absent a continuous administrative practice giving rise to a reasonable expectation of re-employment of the sort alleged in *Sindermann.*

In the instant case, petitioners cannot even claim a property interest of the stature of that in *Roth,* where at least there was no clear legislative intent that the benefit sought should not be granted, nor long-standing administrative practice denying it. Petitioners therefore cannot have had any reasonable expectation that they would receive educational benefits as a result of performing alternative civilian service.

Petitioners attempt to avoid the thrust of *Roth* and *Sindermann* by asserting that the Veterans Read-

justment Benefits Act and the Constitution create a sufficient property interest to meet the test of those cases. But the Act cannot create any property interest in petitioners, since it does not grant them benefits. Moreover, this Court in *Roth* (408 U.S. at 577) stated that "property interests, of course, are not created by the Constitution." In short, petitioners cannot point to any "rules or mutually explicit understandings that support [their] claim of entitlement to the benefit." *Sindermann, supra,* 408 U.S. at 601. Thus, under this Court's decisions in *Roth* and *Sindermann,* they have shown no interest entitled to constitutional protection.

II. THE VETERANS READJUSTMENT BENEFITS ACT OF 1966 IS CONSTITUTIONAL.

The district court based its dismissal of the present actions on the alternative ground that petitioners' challenges to the Veterans Readjustment Benefits were "insubstantial and without merit" (Pet. App. C 24). In affirming the dismissal of the actions under Section 211(a), the court of appeals agreed with that analysis, holding that "the facts alleged in the present case do not present a substantial basis for challenging [Section 211(a)]" (Pet. App. A 16).

Since this Court may affirm the judgment below on any ground having support in the record, *Dandridge* v. *Williams,* 397 U.S. 471, 475-476, n. 6, *Jaffke* v. *Dunham,* 352 U.S. 280, we now demonstrate that the judgment below can properly be affirmed on the

alternative ground that the Veterans Readjustment Benefits Act is constitutional.[9]

A. The Veterans Readjustment Benefits Act satisfies the Due Process Clause of the Fifth Amendment.

Petitioners' due process challenge here is identical to that made in *Robison*. They contend that the Veterans Readjustment Benefits Act violates the equal protection guarantee of the Due Process Clause, since it does not provide educational benefits to conscientious objectors who have performed civilian alternative service, but makes such benefits available only to veterans who have served on active duty. The district court, after carefully reviewing the Act in

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[9] Here, as in *Robison*, the case was properly decided initially by a single judge rather than by a three-judge district court. There is therefore no need for this Court to remand for consideration under 28 U.S.C. 2282. The district court in the instant case ruled that the constitutional challenges were too insubstantial to warrant convening of a three-judge court, and then dismissed the action on the merits. The court acted correctly. See *Ex parte Poresky*, 290 U.S. 30; *Lion Manufacturing Corp.* v. *Kennedy*, 330 F. 2d 833, 840-841 (C.A.D.C.), motion for leave to file petition for writ of mandamus denied *sub nom. Lion Manufacturing Corp.* v. *McGuire*, 373 U.S. 920.

This Court need not reach that question, however, since a three-judge court was unnecessary for a separate reason. As we have shown in our *Robison* brief, pp. 9-12, the relief sought by petitioners (if otherwise within the jurisdiction of the district court) could have been effectively granted through a declaratory judgment without an injunction against enforcement of the statute. See *Majuri* v. *United States*, 431 F. 2d 469, 472-473 (C.A. 3), certiorari denied, 400 U.S. 943; *Sellers* v. *Regents of University of California*, 432 F. 2d 493, 498 (C.A. 9), certiorari denied, 401 U.S. 981.

light of petitioners' contentions, held that "the classification scheme is neither arbitrary or unreasonable and therefore clearly could not violate the Fifth Amendment" (Pet. App. C 23).

In our *Robison* brief (pp. 13-20), we show that this conclusion is correct, and that the Act satisfies due process. We refer the Court to that discussion on this phase of the case.

B. The Act does not violate the First Amendment.

Petitioners' contentions in the courts below in effect raised two First Amendment challenges to the Act: (1) that the Act prohibits the free exercise of their religion and (2) that it is a law respecting an establishment of religion. Neither claim is sound.

(1) *The Free Exercise Claim.*

The short and conclusive answer to petitioners' free exercise claim is that the statute in no way coerces them in the exercise of their religious beliefs.

"[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223. Accord: *Board of Education* v. *Allen*, 392 U.S. 236, 248-249. As the district court correctly noted, "[t]here is no restriction placed on plaintiffs' religious opinions or actions by granting benefits to veterans. In fact the purpose of the conscientious objector exemption is to allow selective service registrants to follow their religious beliefs where they conflict with the purpose of the military" (Pet. App.

C 23). Indeed, the selective service statute itself reflects respect for, rather than interference with, petitioners' religious beliefs by affording them a special exemption from all military service.[10]

Petitioners contend that the Veterans Readjustment Benefits Act interferes with the free exercise of their religion because it in effect penalizes the assertion of their religiously motivated conscientious-objector claim by denying them the benefits available to veterans. This Court's recent decision in *Gillette* v. *United States*, 401 U.S. 437, however, shows that such indirect effect upon the exercise of petitioners' religion does not violate the Free Exercise Clause. The Court there stated (*id.* at 462):

> The conscription laws, applied to [selective conscientious objectors] as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, § 8.

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[10] As this Court noted in *Gillette* v. *United States*, 401 U.S. 437, 445, "the legislative materials reveal a deep concern for the situation of conscientious objectors to war * * * [and] respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state."

Any indirect burden on religion which might result from the denial of benefits to conscientious objectors who performed civilian service similarly does not constitute an impermissible burden on the free exercise of religion. Indeed, the present case is *a fortiori* under *Gillette*, since the denial of veterans benefits has none of the coercive effects of the draft law involved in *Gillette*.

(2) ***The Establishment Clause Claim.***

As the district court properly held, *Gillette* v. *United States*, *supra*, is also dispositive of petitioners' Establishment Clause argument.

In *Gillette*, plaintiffs were selective conscientious objectors who—because of their religious beliefs—refused to participate in the Vietnam war but not in other wars. They challenged the provision of the Selective Service Act limiting conscientious objector status to persons who refused to participate in all wars on the same First Amendment grounds here raised: that is, that the Act impermissibly discriminates among types of religious beliefs. In rejecting this Establishment Clause claim, this Court emphasized that the statute "on its face, simply does not discriminate on the basis of religious affiliation or religious belief * * *" (*id.* at 450). Instead, it "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions" (*id.* at 452). Since there is a "neutral, secular justification for the lines Congress

has drawn" the Establishment Clause is not violated (*id.* at 460).[11]

The same considerations apply with equal if not greater force in the present case. Here, too, the statute does not discriminate on the basis of religion, and does not foster or favor any particular religion any more than do the conscientious objector provisions themselves. Moreover, the veterans' benefit provisions serve the neutral, secular purposes of compensating persons who have served on active duty in the armed forces, with all its greater risks, limitations and disruptions, and encouraging enlistment in the armed forces—purposes which provide a neutral secular justification for the limitation of benefits which Congress has imposed.

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[11] Neither *Gillette* nor this case involves any questions of governmental entanglement in religious practices of the sort which were considered in *Committee for Public Education* v. *Nyquist*, Nos. 72-694, 72-753, 72-791, and 72-929, decided June 25, 1973.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
DEC 3 1973
MICHAEL RODAK, JR., CLERK

No. 72-700

HENRY HERNANDEZ, et al.,
Petitioners,

vs.

VETERANS ADMINISTRATION, et al.,
Respondents.

PETER MILLER, et al.,
Petitioners,

vs.

VETERANS ADMINISTRATION, et al.,
Respondents.

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The government contends in its brief that 38 U.S.C. § 211(a) bars judicial review of petitioners' claims, and that there are no constitutional impediments to thus denying petitioners all access to the courts. Further, it claims that petitioners substantive contentions are in any event so wholly frivolous that federal question jurisdiction is lacking. These arguments are untenable. They ignore (1) the plain meaning of § 211(a); (2) petitioners' right to a meaningful hearing; (3) the necessity for review by the judiciary on issues of constitutionality; and, (4) the merit of petitioners' substantive claims.

I

38 U.S.C. § 211(a) DOES NOT BAR THIS LAWSUIT.

The government argues that the language of 38 U.S.C. § 211(a) clearly forecloses judicial consideration of petitioners' constitutional claims, and further argues

that the 1970 amendment to § 211(a) clarified Congressional intent in this respect. (Gov. Brief, Johnson v. Robison, 72-1297 at 21-22, Gov. Brief, Hernandez at 8-9).

Both contentions are erroneous. First, the purpose of the 1970 amendment to § 211(a) was totally unrelated to the issue here; rather, it was intended to extend finality to decisions of the Administrator involving termination of benefits, thus overruling certain decisions of the Court of Appeals for the District of Columbia. See Pet. Openi Brief at 40-41. Indeed, the entire legislative history of § 211(a) contains no indication that Congress ever intended to preclude constitutional challenges to statutes under which the Veterans Administration operates.

Second, contrary to the government's assertion, § 211(a) by the terms of its language does not extend to the present lawsuit. The Administrator has not nor could he render a decision on the constitutional

questions raised; nor does the question of law to be resolved arise under a law administered by the Veterans Administration.[1/]

II

DUE PROCESS REQUIRES THAT PETITIONERS RECEIVE A MEANINGFUL HEARING.

The government contends that application of § 211(a) to this lawsuit does not violate the due process right to a hearing for two reasons: first, due process only requires a hearing where there are disputed questions of fact, and here there were no disputed factual issues; and second, under Board of Regents v. Roth, 408 U.S. 564 (1973), petitioners' claim for benefits is not entitled to due process protection.

1/ The district court judge who rendered the decision below in this case has recently construed § 211(a) as not constituting a bar to lawsuits challenging the constitutionality of Veterans Administration statutes. Greene v. Board of Veterans Appeals, ____ F.Supp. ____ (N.D.Calif., April 4, 1973).

The government's first contention is totally without merit. Under the due process clause, petitioners are entitled to a hearing appropriate to the nature of their claim. Boddie v. Connecticut, 401 U.S. 371 (1971); Armstrong v. Manzo, 380 U.S. 545 (1965). Petitioners' claim for veterans' educational benefits rests upon undisputed facts; therefore, a meaningful hearing must be one that resolves the questions of law presented. Since petitioners have had no hearing whatsoever on their constitutional claims, they have been denied a meaningful hearing.

The government's Roth argument is also defective. In the government's view, petitioners cannot claim a property interest, as defined in Board of Regents v. Roth, supra, and Perry v. Sindermann, 408 U.S. 593 (1972), because the statute granting benefits clearly excludes them by its terms and they thus had "no reasonable expectation"

of receiving educational benefits. (Gov. Brief at p. 17). Under that approach, no individual who claims that a statute on its face unconstitutionally denies him benefits would be entitled to the procedural protections of the due process clause. Thus, if a statute denied benefits based solely upon race or sex, the claimant discriminated against would not be entitled to a hearing on his claim because he has no "reasonable expectation" of receiving the benefits. Indeed, the more clearly unconstitutional the statute, the less the individual's right to a hearing.

To assert the government's position is to refute it. Certainly, the rationale of Roth and Sindermann encompasses a situation where an individual's claim for entitlement to benefits under a federal statute is based upon the grounds that the statute unconstitutionally excludes him from its terms. Petitioners' claim for benefits does not stem

solely from the Constitution; rather, petitioners contend that a federal statute creating property interests is subject to constitutional limitations (Sindermann, supra, at 597). The interplay of the statutes and these constitutional limitations provide the basis for the "legitimate claim of entitlement" which calls into play due process guarantees. Perry v. Sindermann, supra, at 601.2/

III

CONGRESS MAY NOT FORECLOSE ALL JUDICIAL REVIEW HERE.

The government in its brief has not dealt with a fundamental question at issue here: may Congress enact an allegedly unconstitutional statute and then bar the judiciary from determining its constitutionality. It

2/ If further proof is necessary that petitioners do have a legitimate claim of entitlement and a reasonable expectation of receiving the benefits which they seek, one need look no further than the decision of the District Court in the companion case of Johnson v. Robison, 72-1297, 352 F.Supp. 848 (D.Mass., 1973).

requires no elaborate discussion to recognize that Congress may not thus subvert any constitutional principle it happens to find objectionable, and that any individual aggrieved by an unconstitutional statute can seek a remedy in the courts.

In addition to this basic failure, several of the government's arguments are otherwise flawed. First, despite the government's assertion to the contrary (Gov. Brief 10) petitioners do not rest their case on the proposition that Congress must grant the federal courts all of the powers enumerated in Article III of the Constitution.3/

3/ Petitioners do submit, however, that Congressional control over the jurisdiction of this Court, at least, is circumscribed by Article III of the Constitution. Palmore v. U.S., ___U.S.___, 93 S.Ct. 1670 (1973). Thus, the government's interpretation of § 211(a) does run afoul of Article III. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); and White v. Fenner, 29 F.Cas. #17,547 (C.C. R.I. 1818), cited by the government, are not to the contrary: each of those cases merely affirms the power of Congress to restrict the jurisdiction of courts of its own creation, a power which petitioners concede.

Instead, petitioners rely on a principle at once more narrow in application but more fundamental in origin: some court, somewhere must have the power to review the constitutionality of an Act of Congress. Marbury v. Madison, 5 U.S. 37 (1 Cranch 87)(1803).

Second, the government suggests that § 211(a) indicates Congressional intent to invoke sovereign immunity to bar review of the constitutionality of Veterans Administration statutes. The short answer is that sovereign immunity does not apply, since there is no evidence of Congressional intent to use § 211(a) to withdraw the sovereign's consent to suit. See Lynch v. United States, 292 U.S. 571, 583 (1934). More generally, however, there is simply no substance to the argument that Congress may use immunity from suit to abrogate the Constitution.

The government relies on the footnoted assertion in Larson v. Domestic and Foreign Corp., 337 U.S. 682, 691, n. 11 (1949), that

"a suit [based on the Constitution] may fail . . . if the relief . . . will require affirmative action by the sovereign or the disposition of unquestionably sovereign property". (Gov. Brief 12-13). In analysing that footnote, Professor Jaffe has observed:

> "If [Mr. Chief Justice] Vinson's may is read as may and not as must, it is unobjectionable . . . but if . . . [Larson] excludes an order to dispose 'of unquestionably sovereign property,' it would overrule a long line of Supreme Court decisions. There is nothing whatever in the opinion to indicate an intention to override such well-established doctrines, let alone any reason to do so." (citations omitted) L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV.L.REV. 1, 34 (1963).

Similarly in State of Washington v. Udall, 417 F.2d 1310, 1317-1319, (1969), the Court of Appeals for the Ninth Circuit gave extended consideration to this very issue and concluded:

> "We do not interpret the Larson Court's footnote 11 to mean that a suit must fail if the relief sought includes 'affirmative action by the sovereign or the disposition of unquestionably sovereign property.'" Id. at 1317.

West Coast Exploration Co. v. McKay, 213 F.2d 582, 596 (D.C.Cir., 1954), the only other case to focus on the intended meaning of the Larson footnote, reached the same conclusion:

> "[W]e think that the holding of the Larson case is as above-described in this opinion and that its ruling recognizing the two jurisdictional exceptions is not modified or lessened in force by the footnote referred to, and that it does not preclude the application of the exceptions to cases in which government property is involved."

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An earlier case containing language to the contrary was overruled.[4/]

Respondents' sovereign immunity claim is ultimately disingenuous, for it attempts to turn petitioners' prayer for affirmative relief - payment to them of educational benefits - into a jurisdictional bar. That view not only misdirects the Court's attention to a non-jurisdictional issue, but also is flatly inconsistent with this Court's recognition that the protection of constitutional

4/ The McKay decision continues along lines very similar to those argued here:

"[T]he contention that the Larson case rules . . . is an extreme contention indeed . . . . Under such a ruling the locator of a mining claim . . . could be arbitrarily denied a patent and there would be no recourse in the courts. Such a denial of recourse to the courts would be abhorrent to the justice according to law contemplated by the Constitution. The due process clause of the Fifth Amendment endows the United States courts with power, even though there is no statutory provision for direct review of the action of a public officer, to protect against arbitrary action by such an officer. No such meaning of the Larson case as is contended for can, in our view, be attributed to the Supreme Court." Id. at 596.

rights requires the availability of effective remedies for their violation. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

IV

PETITIONERS' SUBSTANTIVE CLAIMS ARE MERITORIOUS

Finally, the government asserts that petitioners' substantive contentions do not present a substantial federal question, so that the decision to dismiss petitioners' complaints for lack of subject matter jurisdiction was correct.[5/] This theory, however, is wholly untenable in light of the decision of the District Court in Johnson v. Robison, 72-1297, supra, granting summary judgment to plaintiffs in an identical action. As this Court observed

5/ The government incorrectly suggests that the courts below ruled on the merits of this action (Gov. Brief 10, n.9). In fact, the court below considered the merits only for the purpose of determining that petitioners' claims were so wholly lacking in merit that there was no federal question jurisdiction. Since petitioners had correctly sought a three judge court under 28 U.S.C. § 2282, the courts below lacked power to reach the merits.

only last term, the test for determining when a claim raises a substantial federal question is whether that claim is "inescapably frivolous". Goosby v. Osser, 409 U.S. 512, 518 (1973). Given the opinion in Robison, the claims presented here are far from frivolous. Moreover, each of petitioners' substantive claims is fully supported by decisions of this Court. Indeed, petitioners strongly contend that, as the able Brief for the Appellees in Johnson v. Robison, 72-1297, convincingly demonstrates, the lower court decision in Robison in favor of plaintiffs accurately states the law and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

SUPREME COURT OF THE)
)
UNITED STATES)

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that a copy of the foregoing Reply Brief of Petitioners was mailed today to the following attorneys as counsel for respondents:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Dated: November 30, 1973.

Richard L. Goff

HERNANDEZ ET AL. v. VETERANS' ADMINISTRATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-700. Argued December 11, 1973—Decided March 4, 1974

Petitioners, who were denied educational benefits under the Veterans' Readjustment Benefits Act of 1966 because, as conscientious objectors exempt from the military service who performed alternative civilian service, they were ineligible for such benefits, brought actions challenging the constitutionality, on First and Fifth Amendment grounds, of the provisions of the Act making them ineligible. The District Court dismissed the actions on the grounds that jurisdiction was barred by 38 U. S. C. § 211 (a) and petitioners' constitutional claims were insubstantial and without merit. The Court of Appeals affirmed on the basis of the jurisdictional bar. *Held:* Section 211 (a) does not bar judicial consideration of constitutional challenges to veterans' benefits legislation. *Johnson* v. *Robison*, *ante*, p. 361. P. 393.

467 F. 2d 479, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., concurs in the result.

Jack R. Petranker, pro hac vice, and *Lawrence L. Curtice* argued the cause for petitioners. With them on the briefs were *Stephen V. Bomse* and *Charles C. Marson*.

Gerald P. Norton argued the cause for respondents. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Harriet S. Shapiro, Morton Hollander*, and *William Kanter*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, like the appellee and his class in *Johnson* v. *Robison*, *ante*, p. 361, are Class I–O conscientious ob-

jectors who, upon completion of alternative civilian service pursuant to § 6 (j) of the Military Selective Service Act, 50 U. S. C. App. § 456 (j), and the governing regulations of the Selective Service System, 32 CFR, Part 1660, applied for educational benefits provided by the Veterans' Readjustment Benefits Act of 1966. The Veterans' Administration denied petitioners' application for the reasons upon which appellee Robison's request was denied, *i. e.*, because a Class I–O conscientious objector who has performed alternative civilian service does not qualify under 38 U. S. C. § 1652 (a)(1) as a "veteran who . . . served on active duty" (defined in 38 U. S. C. § 101 (21) as "full-time duty in the Armed Forces"), and is therefore not an "eligible veteran" entitled under 38 U. S. C. § 1661 (a) to veterans' educational benefits provided by the Veterans' Readjustment Benefits Act of 1966.

Alleging that those sections of the 1966 Act discriminate against conscientious objectors in violation of the Fifth Amendment, and infringe the Religion Clauses of the First Amendment, petitioners filed two actions seeking declaratory, injunctive, and mandamus relief and requesting the convening of a three-judge district court. The District Court consolidated the two cases and granted the Government's motion to dismiss on the grounds that "plaintiffs' requests for affirmative relief are not within the jurisdiction of this Court due to the mandate of 38 U. S. C. § 211 (a) . . . [and] the plaintiffs' challenge . . . based on alleged violations of the Fifth and First Amendments to the United States Constitution are [*sic*] insubstantial and without merit." 339 F. Supp. 913, 916 (1972). Notwithstanding the District Court's dismissal of petitioners' *constitutional* claims on the ground of insubstantiality, the Court of Appeals, as we read that court's opinion, construed the order of dismissal as based solely upon the jurisdictional bar of § 211 (a), and af-

firmed the District Court on that ground. 467 F. 2d 479 (1972). We granted certiorari and set the case for oral argument with *Johnson* v. *Robison*, *ante*, p. 361. 411 U. S. 981 (1973).

We have held today in *Johnson* v. *Robison* that § 211 (a) does not bar judicial consideration of constitutional challenges to veterans' benefits legislation. Accordingly, the judgment of the Court of Appeals is vacated and the case remanded for further proceedings consistent with our opinion in *Johnson* v. *Robison*.

It is so ordered.

MR. JUSTICE DOUGLAS concurs in the result for the reasons stated in his dissenting opinion in *Johnson* v. *Robison*, *ante*, p. 386.